No. 4122

United States

Circuit Court of Appeals

For the Ninth Circuit

THE MOHAWK RUBBER COMPANY OF NEW YORK, INC., a corporation,

Plaintiff in Error,

v.

EDGAR J. MUNNELL and ARTHUR J. SHERRILL, individually, and as co-partners doing business under the firm name and style of Munnell & Sherrill,

Defendants in Error.

REPLY TO PETITION FOR REHEARING

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The petition for rehearing is not supported by a certificate of counsel that the petition is well founded and that it is not interposed for delay, as required by rule 29 of this Court.

Every matter referred to in the petition has been heretofore fully presented by defendants in

error in a voluminous brief and in oral argument, and from the opinion rendered it is apparent that every proposition advanced in the present petition has received the attention and consideration of the Court.

It is again urged that Fitzgerald's authority to make an agreement that would result in the return of merchandise and release defendants from liability for the purchase price, was established, because Fitzgerald had himself testified to the bare conclusion that he had authority to do the things he did do. (Petition, page 7.) This was the very point made upon the hearing and was the only evidence defendants relied on to support the judgment. (Defendants' Brief, pages 110 and 111.) The contention received the attention and the consideration of the Court, for in its opinion the Court says:

> "It is correct that on cross-examination Fitzgerald testified for contracts that he did make, he had authority. But when that statement is considered with other portions of his evidence, it is clear that he referred to an agreement which he admitted having made. He explained that for the $6500.00 credit transaction and the November, 1920, agreement to take back the tires he had special authority which was necessary, but stated that without such authority his agency was limited merely to the selling end. His testimony was positively accepted in the matter just referred to,

"He had no authority to make and that he did not tell defendant that he could ~~not~~ make any agreement for rebate or cancellation of notes or return of tires."

The petition is misleading because it is made up by culling a phrase here and there from the letters and testimony, and the argument is based upon these isolated phrases.

For example, on page 6 of the petition counsel quote a single question and answer, which is as follows:

"Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy if he would accept the whole or any part of the merchandise?

A. Correct."

But omit the next two questions and answers, which are as follows (pages 490-491):

"Q. It wasn't contemplated that the Mohawk Company would take back any of that merchandise?

A. No, that merchandise was of no benefit to us; no use to us.

Q. Had you been authorized by Mohawk Company to make any arrangement which would result in these tires coming back to them?

A. I had not."

It is apparent, when this testimony is read together, that while Fitzgerald was arranging to change the representation in this territory from Munnell & Sherrill to Cassidy, he was not making any agreement and had no authority to make any agreement which would result in the return of Munnell & Sherrill's stock of tires to the Mohawk Company and to release them from liability for the purchase price thereof.

The same criticism is applicable to the quotation of the isolated questions and answers on page 7 of the petition, for that testimony has reference to those contracts which he admitted having made and not to those contracts which he denied having made. Fitzgerald was emphatic in his denial that he made any agreement that would result in the return of Munnell & Sherrill's stock of tires or that he had agreed to release them from liability. The quotations on page 7 of the petition have reference to those contracts which he made upon **express instructions** from his principal.

On page 9 counsel again quotes an excerpt from a letter which cannot be construed by itself. The fore part of the same letter, which is not quoted, says: (page 273.)

> "Inasmuch as the tires were originally shipped to you and have never been charged to anyone else, it is natural and logical that they be considered your property, regardless of the

> course which they took after leaving your hands."

This is a denial of authority to make an agreement that would result in the return of Munnell & Sherrill's stock of tires and to release them from liability, and not a confirmation of authority, as counsel argues from the excerpt that he quotes.

On page 12 of the petition is another misleading excerpt. Counsel quotes from plaintiff's letter of September 26, 1921, in which plaintiff says:

> "This will acknowledge your letter of Sept. 21st and we note that you have transferred the greater portion of this stock to the American Tire & Rubber Company and in accordance with instructions from Mr. Fitzgerald."

The Court will observe that the phrase "in accordance with instructions from Mr. Fitzgerald" is printed in italics; is treated as though uttered by plaintiff, and on the following page counsel argues that this is an acknowledgment that the transfer was made in accordance with instructions. The fact is, however, that on September 21 defendants wrote plaintiff (Petition, page 11):

> "On instructions from Mr. Fitzgerald we have transferred all of our stock of Mohawk tires to the American Tire & Rubber Company."

In acknowledging receipt of this letter plaintiff said:

> "This will acknowledge your letter of Sept. 21st and **we note** that you have transferred the greater portion of this stock to the American Tire & Rubber Co. in accordance with instruction from Mr. Fitzgerald . . ."

Plaintiff was merely quoting defendants' statement in their letter, but counsel by italicizing and by his argument on page 13 attempts to put the phrase "in accordance with instructions from Mr. Fitzgerald . . ." into the mouth of the plaintiff, and bases thereon the assertion that this phrase is a confirmation of the authority of Fitzgerald to bind plaintiff by agreements for the return of merchandise and agreements releasing defendants from the liability for the purchase price of the merchandise. This is a manifest attempt at juggling words and not an attempt to aid the Court in construing the letters.

The question involved, however, is not whether Fitzgerald gave the permission. The important point, the one that was involved and decided, is whether he had authority to give any permission which would result in a contract for the return of merchandise and release from liability for the purchase price, and there is not a word in the letter referred to which creates or confirms such authority.

In the same two letters, to-wit, September 21st and 26th, the defendants suggest that arrange-

ments could be made to permit them to handle the line in conjunction with Cassidy. In replying to this suggestion plaintiff said that it would be glad to have them do so, provided it was agreeable to Cassidy, but added "that the whole matter is something that would have to be handled by Mr. Fitzgerald." This, of course, referred to the matter of selling tires to Munnell & Sherrill after the arrangement with Cassidy, and had to do with the "selling end" of the business. Counsel, however, attempts to urge upon this Court that the statement:

> "The whole matter is something that will have to be handled by Mr. Fitzgerald"

is a confirmation of authority to consent to the return of old stock of tires and to release defendants from liability.

Counsel again urges that because Fitzgerald said that he had authority to make the agreements that he did make that this constituted evidence as to the scope of his authority. The same argument was made before and was disposed of by this Court in the decision heretofore rendered.

Counsel say that they are forced to infer from the opinion that the lack of authority in Mr. Fitzgerald in the note transaction proved the lack of authority on the part of Fitzgerald in the Cassidy deal. The opinion heretofore rendered indicates that the Court considered the entire record and held:

> "We regard the written communications put in evidence, when considered with the oral testimony, as conclusively showing that except by special authorization the authority of Fitzgerald was limited and that he had no power **to permit a return of merchandise or to relieve defendants of liability for the purchase price of merchandise sold** and delivered by plaintiff to defendants, and that such limitation of Fitzgerald's authority was thoroughly well known to defendants."

This part of the opinion deals with the matter of returning merchandise and releasing purchaser from liability for the purchase price and is dealt with **apart from the question of the right to give rebates or cancel notes,** and counsel's inference is undoubtedly due to lack of appreciation of the opinion rendered.

On page 6 of the petition defendants again urge as they did in their briefs and upon the hearing that because Fitzgerald had authority to make territorial arrangements with his customers, the authority to cancel debts, relieve from liability and agree to the return of merchandise was incident thereto. This contention was fully presented by the briefs and argued at length and therefore presents nothing that has not already received the attention of the Court. Counsel did not support this proposition by authority before and it does not now and from the bare statement of the proposition it is

apparent that authority to release from an indebtedness or to agree to the return of merchandise can not possibly be incident to the right to make territorial arrangements with customers, especially in view of the fact that the defendants had absolute knowledge of the limitation of Fitzgerald's authority. (Exh. KK, Tr. p. 188.)

Every exhibit and every excerpt referred to in the petition was referred to and fully discussed in defendants' brief, and every argument advanced in the petition was made in the brief and in the oral argument. They have all received the attention and consideration of the Court and we are unable to perceive from the petition any reason for a further hearing.

Respectfully submitted,

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